CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-036133-094

SUPERIOR COURT
Commercial Division
(Sitting as a Court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
and
ABITIBI-CONSOLIDATED INC.
and
BOWATER CANADIAN HOLDINGS INC.

And the other Petitioners listed herein

Petitioners-Debtors

and

ERNST & YOUNG INC.

Monitor

and

AURELIUS CAPITAL MANAGEMENT, LP

and

CONTRARIAN CAPITAL MANAGEMENT, L.L.C.

Noteholders

OBJECTION AND PLAN OF ARGUMENT OF AURELIUS CAPITAL MANAGEMENT, LP AND CONTRARIAN CAPITAL MANAGEMENT, L.L.C. IN CONNECTION WITH PETITIONERS' MOTION SEEKING AN ORDER SANCTIONING THE PETITIONERS' PLAN OF REORGANIZATION AND COMPROMISE AND OTHER RELIEF

AURELIUS CAPITAL MANAGEMENT, LP AND CONTRARIAN CAPITAL MANAGEMENT, L.L.C. (HEREINAFTER THE "NOTEHOLDERS") CONTEST THE FOREGOING MOTION (THE "SANCTION MOTION") FOR THE REASONS STATED BELOW:

1. Aurelius Capital Management, LP and Contrarian Capital Management, L.L.C. (collectively the "**Noteholders**") oppose the relief requested by the CCAA Applicants in the Sanction Motion including, without limitation, the request to sanction the Plan.[1]

Background

2. Bowater Canada Finance Company ("**BCFC**") is a petitioner under these CCAA proceedings and is also a debtor under parallel proceedings under chapter 11 of the US Bankruptcy Code. Its creditors overwhelmingly voted to reject the Plan.

3. BCFC was formed as an unlimited company organized under the laws of Nova Scotia for the purpose of engaging in tax-advantaged financing of the Canadian operations of Bowater. In 2001, BCFC issued $600 million of unsecured notes due November 2011 (the "**BCFC Notes**"), which are guaranteed by Bowater Incorporated ("**Bowater**") and are BCFC's only material liabilities. The Noteholders, through their managed fund entities, hold in excess of one-third of the BCFC Notes.

4. On September 14, 2010, the BCFC Affected Unsecured Creditor Class voted to reject the Plan. As such, this Court does not have jurisdiction to sanction the Plan with respect to BCFC or in a way which affects the BCFC Affected Unsecured Creditor Class. However, the Sanction Motion improperly seeks to compromise the rights and interests of BCFC's creditors and BCFC.

5. BCFC is a wholly-owned subsidiary of Bowater and has no employees or independent business operations. BCFC has no business to restructure. BCFC is not an obligor on any post-petition financing.

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[1] Defined terms have the meaning set forward in the Plan of Reorganization and Compromise of AbitibiBowater Inc. and certain of its subsidiaries listed in Schedule "A" thereto pursuant to the *Companies' Creditors Arrangement Act.*

6. BCFC's only material assets are claims against other Petitioners-Debtors, Bowater, the BCFC Board, and its officers.

7. BCFC is also the owner of preferred shares (the "**BCHI Interests**") in Bowater Canada Holding Inc. ("**BCHI**"), which, according to the Petitioners-Debtors, is a wholly-owned subsidiary of Bowater and a holding company for Bowater's Canadian activities. This ownership of the BCHI Interests arose from a series of complicated and poorly disclosed intercompany transactions (the "**Intercompany Transactions**") occurring between October 2001 and April 16, 2009. The value of the BCHI Interests depends on BCHI challenging the Intercompany Transactions and recovering from other Petitioners-Debtors, Bowater and their affiliates. In addition, through the Intercompany Transactions, BCFC may have given up significant value for very little consideration, potentially giving rise to significant claims by BCFC and its creditors against various parties.

8. The Intercompany Transactions are in the process of being investigated by both (i) the law firm of Togut, Siegel and Siegel LP, as conflicts counsel to BCFC; and (ii) AP Services LLC, a special advisor to BCFC and Lisa Donahue as BCFC's Vice-President/ Restructuring (collectively the "**Independent Advisors**") who were appointed by the US Bankruptcy Court on June 25, 2010. A report on the Intercompany Transactions from the Independent Advisors is not expected until, at the earliest September 24, 2010.

9. BCFC also has potential claims against its officers and the BCFC Board for, amongst other things, breach of fiduciary duties in connection with both the Intercompany Transactions and the abdication of their fiduciary duty.

Overview of Objection

10. The Noteholders oppose the sanction of the Plan as:

10.1 **BCFC did not have an opportunity to vote on the Plan**: Having not been provided a vote, the Plan can not be sanctioned in a way that affects BCFC. The Plan inappropriately seeks not only to compromise and release claims BCFC may have against the other Petitioners-Debtors as a result of the Intercompany

Transactions or otherwise, but also seeks to strip any value of the BCHI Interests held by BCFC;

10.2 **No process has been established to provide that BCFC will receive distributions as a creditor of other Petitioners-Debtors**: The Information Circular dated August 2, 2010 provides that:

> ...Should there be a No Vote Occurrence, the Applicants intend to initiate a process to allow any No Vote Applicant to file Claims against the other Applicants, and ultimately receive distributions on account of any Proven Claims under the CCAA Plan.[2]

Because the BCFC Affected Unsecured Creditor Class did not approve the Plan, pursuant to the terms of the Plan, BCFC is a No Vote Applicant. However, despite the representation in the Information Circular provided above, the Petitioners-Debtors have not initiated a process to allow BCFC to file Claims against any of the other Petitioners-Debtors so as to receive distributions on account of any Proven Claims which may eventually be held by BCFC as a creditor of the other Petitioners-Debtors. Further, the Plan contemplates interim distributions which could occur before BCFC has had an opportunity to assert any claims. Essentially, the Petitioners-Debtors are seeking to have creditors of other Petitioners-Debtors expropriate value from BCFC;

10.3 **The requested release provisions are overly broad and inappropriate**: The Court does not have jurisdiction to sanction the Plan in the manner requested as the Plan and Sanction Order contain overly broad and inappropriate release provisions which eliminate claims held by the Noteholders and by BCFC even though the BCFC Affected Unsecured Creditor Class voted to reject the Plan and where BCFC was not provided with an opportunity to vote on the Plan in its capacity as creditor of other of the Petitioners-Debtors; and

10.4 **The NAFTA Settlement funds have not been appropriately allocated.** Recently, the Petitioners-Debtors filed settlement motions in the U.S. and Canada

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[2] See page 87-88 of Information Circular dated August 2, 2010.

related to certain claims made by certain of the Petitioners-Debtors, which alleged that the Government of Newfoundland and Labrador expropriated the property of these Petitioners-Debtors, including real property and equity interests hydroelectric facilities in the province (the "**NAFTA Settlement**"). Pursuant to the settlement agreement the Government of Canada has agreed to pay CAD$130 million to the Petitioners-Debtors' primary reorganized Canadian operating subsidiary. In exchange, the NAFTA Settlement purports to settle claims that are assets of the estates of various Petitioners-Debtors. It is unclear which Petitioners-Debtors should be entitled to the proceeds of the NAFTA Settlement. However, the value of the NAFTA Settlement is being diverted to the reorganized Petitioners-Debtors rather than being apportioned to the creditors who are entitled to receive it.

11. As such, the Plan does not meet the test for sanctioning by this Court which has been articulated as follows:

> 1. There must be strict compliance with all statutory requirements;
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> 2. All materials filed and procedures carried out must be examined to determine if anything has been done [or purported to have been done] that is not authorized by the CCAA.; and
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> 3. The plan must be fair and reasonable.[3]

BCFC did not have an opportunity to vote on the Plan

12. Claims held by BCFC against the other Petitioners-Debtors were not previously subject to any Court approved claims process. Intercompany Claims were excluded from the Claims Procedure Order dated August 29, 2009, the Claims Procedure Order dated January 18, 2010 and the Second Claims Bar Date Order dated February 23, 2010. As such, there was no process in which BCFC could assert claims against other of the Petitioners-Debtors.

[3] *ATB Financial v. Metcalf & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 260 (Ont. S.C.J. Commercial List) at para 3. affirmed by (2008), 296 D.L.R. (4th) 135 (Ontario C.A.); and (*Olympia & York Developments Ltd. Re* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.).

13. Further, until the appointment of the Independent Advisors on June 25, 2010, there were no independent persons who were able to impartially investigate and assert claims in favour of BCFC against the other Petitioners-Debtors. Since their appointment approximately two months ago, the Independent Advisors have taken steps to investigate claims by BCFC against other Petitioners-Debtors, however, have not yet been in a position to cause BCFC to assert such claims or participate in their adjudication.[4]

14. As BCFC has not had an opportunity to vote on the Plan, this Court has no jurisdiction to sanction the Plan in any way that affects BCFC.[5] As the draft order proposed by the Petitioners-Debtors in the Sanction Motion seeks to bind BCFC, such relief should not be granted.

No process has been established to provide that BCFC will receive distributions as a creditor of other Petitioners

15. The Noteholders previously filed an objection to the Petitioners-Debtors' request for a Creditors' Meeting Order which included approval of the Information Circular, filing of the Plan and approval of a process for creditors meetings to vote on the Plan (the "**Creditors' Meeting Motion**").

16. Prior to the hearing of Creditors' Meeting Motion, the Petitioners-Debtors agreed to amend the Information Circular to add the following language in describing the effect of a No Vote Occurrence of any particular Petitioner-Debtor:

> ...Should there be a No Vote Occurrence, the Applicants intend to initiate a process to allow any No Vote Applicant to file Claims against the other Applicants, and ultimately receive distributions on account of any Proven Claims under the CCAA Plan.[6]

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[4] Other than the claim by BCFC against Bowater for contribution under section 135 of the Companies Act (Nova Scotia) (the "**Wind-up Claim**"). As the Wind-Up Claim is a claim against Bowater who is not a Petitioner-Debtor, but is rather only a US debtor under the Chapter 11 Proceedings, the adjudication of the Wind-up Claim has been taken into account in the US Plan put forward under the Chapter 11 Proceedings and will be dealt with by the US Bankruptcy Court. Counsel for the Petitioners-Debtors confirmed at the meeting of creditors that the releases are not intended to release BCFC's Wind-Up Claim against Bowater.

[5] See *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. Sup. Ct.) at paras. 38 and 42 and; *Re Doman Industries Ltd.* (2003), 41 C.B.R. (4th) 29 (B.C.S.C.) at para 9.

[6] See page 87-88 of Information Circular dated August 2, 2010.

17. As such, the Petitioners-Debtors agreed that should the BCFC Affected Unsecured Creditors Class vote to reject the Plan and BCFC became a No Vote Applicant, that the Petitioners-Debtors would initiate a process by which BCFC could file claims against the other Petitioners and BCFC could ultimately receive distributions under the Plan if such claims were found to be Proven Claims.

18. As noted above, on September 14, 2010, the BCFC Affected Unsecured Creditors Class did vote to reject the Plan and as such BCFC became a No Vote Applicant. The Petitioners-Debtors, however, have not provided, in the proposed Sanction Order or otherwise, any process by which BCFC can assert claims against the other Petitioners and if those claims are ultimately found to be valid, by which BCFC can receive distributions under the Plan.

19. Instead, they propose to have BCFC release all claims against other Petitioners-Debtors. The Petitioners-Debtors should be required to initiate a process to allow BCFC to assert claims against other Petitioners-Debtors. Any claims asserted, if not disputed would then entitle BCFC to receive distributions. If such claims are disputed, they would be subject to determination, and a reserve would be set aside for such disputed claims. In this manner, any BCFC disputed claim would be no different than any disputed claim of any other creditor dealt with in Article 5 of the Plan.

20. The result of the Petitioners-Debtors failure to bring forward a claims process as they undertook to in the Court approved Information Circular is that there has not been strict compliance with all statutory requirements and adherence to previous orders of the Court. Further, permitting a Plan to be sanctioned whereby other creditors vote to expropriate value from BCFC (which is the result if no claims process is run) is patently unfair and unreasonable. The process by which the Intercompany Transactions were put before the Court is no claims process at all. It has none of the hallmarks of a claims process or adversarial proceeding where there is production of documents and where the party

whose interests are being compromised (namely BCFC) is represented before the Court. As such, the test for sanctioning[7] has not been met and the Plan can not be sanctioned.

21. Further, sanctioning the Plan in the manner requested includes the approval of the Amended Restructuring Transactions Notice as set out in the Supplemental Fifty Seventh Report to Court of the Monitor dated September 13, 2010. No claims were filed against BCHI in the various claims processes run in these proceeds. The only claims against BCHI appear to be intercompany claims. The Amended Restructuring Transactions Notice contemplates BCHI releasing the intercompany claims which it holds against other Petitioners-Debtors. As the creditors of BCHI have not voted to approve the Plan and as the BCFC Affected Unsecured Creditors voted to reject the Plan, the Court does not have jurisdiction to sanction the Plan in a way that strips assets from BCFC in this manner.

22. Not providing a process to quantify and validate claims by BCFC against the other Petitioners-Debtors is particularly egregious as the valuations that were used to determine the proportion of stock in the reorganized debtors that creditors of each of the Petitioners-Debtors were to receive purported to take into account the value of Intercompany Claims. However, because the other Petitioners-Debtors do not agree (yet) that BCFC has any Intercompany Claims against any of the Petitioners-Debtors (other than claims against Bowater Incorporated a US Debtor), claims of BCFC, including those arising from the Intercompany Transactions were not taken into account in allocating shares to BCFC's creditors. Accordingly, BCFC should not be giving or receiving any releases.

The requested release provisions are overly broad and inappropriate

23. Section 6 of the CCAA provides that a Court may only sanction a plan of compromise or arrangement once it has been approved by the requisite majorities. As the Plan was not approved by the requisite majority of BCFC's creditors, this Court does not have jurisdiction to sanction the Plan in a way that compromises or affects the claims by or against BCFC or its agents, directors or officers.

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[7] *Ibid* note 3.

24. The current version of the Plan and draft Sanction Order impermissibly affect BCFC and its officers and directors. For example, the broad and overreaching language in sections 6.10(a) and (b) of the Plan and paragraph 22 of the draft Sanction Order seek to release and enjoin claims by BCFC and the Noteholders against not only the other Petitioners-Debtors, but also the US Debtors, including Bowater, their directors, officers, advisors, legal counsel and a wide range of other persons, all of which is entirely inappropriate. The requested release of claims by BCFC against Bowater is in direct contrast to representations by counsel for the Petitioners-Debtors at the meeting of creditors whereby it was confirmed that the releases were not intended to release BCFC's claim against Bowater (which it filed in Bowater's Chapter 11 proceedings).

25. At the very least parties providing a release of third parties must have had the opportunity to vote on the Plan and the class of creditors providing such releases must have voted to accept the Plan by the required majorities.[8] Such is not the case here.

26. Further, many of the third parties which are the beneficiaries of the requested releases are not providing value to the Petitioners-Debtors as part of the Plan (and certainly not to BCFC who has voted to reject the Plan) and there is no evidence that these releases are a necessary component of the Plan.

27. The Court does not have the jurisdiction to release or enjoin such claims where the creditors of BCFC have voted to reject the Plan and BCFC as a creditor in respect of the other Petitioners-Debtors has not been given an opportunity to vote on the Plan. Not only is such a violation of the CCAA, but is also patently unfair and unreasonable.

28. Further, the Cross-Border Petitioners-Debtors are seeking releases both from this Court and from the U.S. Bankruptcy Court in respect of the Chapter 11 Plan. It is noteworthy that under Chapter 11, creditors may elect to not provide releases to the directors of officers of the applicable entities. By then providing for exactly such release of the directors and officers under the CCAA Plan, the incongruous result is that claims against directors and officers are released in Canada, but not in the United States. Such a result

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[8] *ATB Financial v. Metcalf & Mansfield Alternative Investments II Corp.* (2008) 296 D.L.R. (4th) 135 (Ont. C.A.).

is not fair and reasonable in the circumstances and the Plan should not be sanctioned in this manner.

The NAFTA Settlement funds have not been appropriately allocated.

29. As noted above, pursuant to, the NAFTA Settlement, the Government of Canada has agreed to pay CAD$130 million to the Petitioners-Debtors' primary reorganized Canadian operating subsidiary. In exchange, the NAFTA Settlement purports to settle claims that are assets of the estates of various Petitioners-Debtors. It is unclear which Petitioners-Debtors should be entitled to the proceeds of the NAFTA Settlement. However, the value of the NAFTA Settlement is being diverted to the reorganized Petitioners-Debtors rather than being apportioned to the creditors who are entitled to receive it. Further, there is no basis on which third parties should be getting any releases.[9] Such is unfair and unreasonable.

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[9] *Ibid* note 9.

30. The Noteholders therefore request an order dismissing the Sanction Motion.

Montreal, September 17, 2010

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No. **500-11-036133-094**

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Noteholders

Me Louis Dumont (N/d : 541555-2)
Me Neil Rabinovitch

OBJECTION AND PLAN OF ARGUMENT OF AURELIUS CAPITAL MANAGEMENT, LP AND CONTRARIAN CAPITAL MANAGEMENT, L.L.C. IN CONNECTION WITH PETITIONERS' MOTION SEEKING ADVICE AND DIRECTION WITH RESPECT TO BCFC'S WIND-UP CLAIM AGAINST BOWATER, INC. UNDER SECTION 135 OF THE COMPANIES ACT (NOVAS SCOTIA)

ORIGINAL

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